(8)

No. 06-571

FILED
AUG 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

MICHAEL A. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

KARL J. KOCH
McGlynn, Glisson & Koch
340 Florida Street
Baton Rouge, LA 70801
(225) 344-3555

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
2000 L Street, N.W.
Washington, D.C. 20036
(202) 466-2234

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. THE ORDINARY OR NATURAL MEANING OF "USE" DOES NOT ENCOMPASS MERE RECEIPT 1

A. Respondent Concedes That Its Reading Is Not Natural, And Its Bid To Bury That Meaning In "Context" Is Baseless 1

B. Respondent Distorts *Smith* And *Bailey* 3

II. SECTION 924(D) OFFERS NO SUPPORT TO THE CLAIM THAT MERE RECEIPT OF A GUN CONSTITUTES "USE" UNDER § 924(C)(1) 7

A. Respondent's Argument That All Elements Of § 924(d)'s Predicate Offenses Constitute "Use" Misunderstands *Smith* and Violates *Bailey* 7

B. Section 924(d)'s Specialized Purpose And Passive Grammatical Construction Deny It A Dispositive Role In Interpreting § 924(c)(1) In This Case 11

III. NO POLICY CONSIDERATION SUPPORTS GIVING "USE" AN UNNATURAL CONSTRUCTION 13

IV. RESPONDENT'S ACCOUNT OF THE LENITY DOCTRINE IS INCOMPLETE AND MISLEADING 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Arthur Andersen LLP v. *United States*, 544 U.S. 696 (2005) 19

Bailey v. *United States*, 516 U.S. 137 (1995) ..... *passim*

Bousley v. *United States*, 523 U.S. 614 (1998) 20

Castillo v. *United States*, 530 U.S. 120 (2000) 19

City of Chicago v. *Morales*, 527 U.S. 41 (1999) 20

Cleveland v. *United States*, 531 U.S. 12 (2000) 19, 20

Harris v. *United States*, 959 F.2d 246 (D.C. Cir. 1992) 14

Jones v. *United States*, 529 U.S. 848 (2000) 15

Leocal v. *Ashcroft*, 543 U.S. 1 (2000) 19

McLaughlin v. *United States*, 476 U.S. 16 (1986) 16

McNally v. *United States*, 483 U.S. 350 (1987) 19

Muscarello v. *United States*, 524 U.S. 125 (1998) 2, 13, 15

Origet v. *United States*, 125 U.S. 240 (1888) 12

Palsgraf v. *Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) 12

Scheidler v. *NOW, Inc.*, 537 U.S. 393 (2003) 19

Smith v. *United States*, 508 U.S 223 (1993) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

St. Mary's Honor Center v. *Hicks*, 509 U.S. 502 (1993) 6

United States v. *Bajakajian*, 524 U.S. 321 (1998) 11, 12

United States v. *Bass*, 404 U.S. 336 (1971) 20

United States v. *Burgos*, 254 F.3d 8 (1st Cir. 2001) 16

United States v. *Cotto*, 456 F.3d 25 (1st Cir. 2006) 1

United States v. *Frederick*, 406 F.3d 754 (6th Cir. 2005) 17

United States v. *Hernandez*, 80 F.3d 1253 (9th Cir. 1996) 16

United States v. *Jimenez Recio*, 537 U.S. 270 (2003) 18

United States v. *Kozminski*, 487 U.S. 931 (1988) 18

United States v. *Long*, 905 F.2d 1572 (D.C. Cir. 1990) 16

United States v. *Matra*, 841 F.2d 837 (8th Cir. 1988) 13

United States v. *McKinney*, 120 F.3d 132 (8th Cir 1997) 13

United States v. *Montano*, 398 F.3d 1276 (11th Cir. 2005) 14

United States v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984) 11

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Phelps*, 895 F.2d 1281 (9th Cir. 1990) 16

United States v. *Stewart*, 246 F.3d 728 (D.C. Cir. 2001) 1, 15

United States v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) 16

United States v. *Sumler*, 294 F.3d 579 (3d Cir. 2002) 1

United States v. *Westmoreland*, 122 F.3d 431 (7th Cir. 1997) 1

United States v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) 13

Statutes and Legislative History

114 Cong. Rec. 22,231 (1968) 15

18 U.S.C. § 922(a)(1) 8, 10

18 U.S.C. § 922(a)(3) 8, 10

18 U.S.C. § 922(g) 15

18 U.S.C. § 922(g)(1) 18

18 U.S.C. § 922(j) 8, 9

18 U.S.C. § 922(l) 8, 10

18 U.S.C. § 922(n) 8, 10

18 U.S.C. § 924(b) 9, 10

TABLE OF AUTHORITIES—Continued

Page(s)

18 U.S.C. § 924(c)(1) ..... *passim*

18 U.S.C. § 924(d) ..... *passim*

21 U.S.C. § 841(a)(1) 15

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 6212, 102 Stat. 4360 (1998) 13

Other Authorities

BLACK'S LAW DICTIONARY (6th ed. 1990) 4

Brief for the United States, *Arthur Andersen LLP* v. *United States*, No. 04-369 19

Brief for the United States, *Bailey* v. *United States*, Nos. 94-7558 and 94-7492 ..... 5, 13, 15

Brief for the United States, *Castillo* v. *United States*, No. 99-658 19

Brief for the United States, *Leocal* v. *Ashcroft*, No. 03-583 19

Brief for the United States, *Smith* v. *United States*, No. 91-8674 15

Petition for Writ of Certiorari, *Smith* v. *United States*, No. 91-8674 3

Transcript of Oral Argument, *Bailey* v. *United States*, Nos. 94-7558 and 94-7492 6

Transcript of Oral Argument, *Smith* v. *United States*, No. 91-8674 15

REPLY BRIEF FOR THE PETITIONER

I. THE ORDINARY OR NATURAL MEANING OF "USE" DOES NOT ENCOMPASS MERE RECEIPT

A. Respondent Concedes That Its Reading Is Not Natural, And Its Bid To Bury That Meaning In "Context" Is Baseless

In *Smith* v. *United States*, 508 U.S 223, 228 (1993), and again in *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), this Court held that the term "use" in 18 U.S.C. § 924(c)(1) must be given its "ordinary or natural meaning." Respondent candidly acknowledges that "it may not be *natural*" to say that a buyer "uses" the item he receives in a commercial exchange (Resp. Br. 16 (emphasis added)), and rightly so. As we have explained (Br. 11-13), "[a] seller does not 'use' a buyer's consideration." *United States* v. *Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997). Indeed, "'there is no grammatically correct way to express that a person receiving a payment is thereby "using" the payment.'" *United States* v. *Sumler*, 294 F.3d 579, 583 (3d Cir. 2002) (quoting *Westmoreland*, 122 F.3d at 435); see also *United States* v. *Cotto*, 456 F.3d 25, 28 (1st Cir. 2006); *United States* v. *Stewart*, 246 F.3d 728, 731 (D.C. Cir. 2001). That is where this case should end.

Respondent's claim that the person who acquires a gun (with drugs) "uses" the gun, even though someone acquiring a cup of coffee (with cash) plainly does not "use" the coffee, is baseless. Respondent insists (Br. 16) that the word "use" carries a meaning with respect to "true barter" transactions that it does not have where "exchanges involving money" are concerned. Not surprisingly, respondent adduces no authority to support this assertion. Instead, respondent simply posits that a cash purchase "do[es] not capture the give-and-take character of any bartering transaction, in which each bartered item is central to the transaction." *Id.* But is not a cash purchase equal parts "give" and "take"? Is currency not equally "central" to a cash

transaction? Even if there were any conceivable basis for drawing such a distinction – and respondent identifies none – it is entirely far-fetched to say that Congress had in mind "true barter" but not cash transactions when it enacted § 924(c)(1)'s prohibition on firearm "use."[1]

Respondent similarly asserts (Br. 16) that the word "use" carries a different meaning in a *drug* transaction than in other commercial transactions. Even if it makes no sense to say that a purchaser "uses" a cup of coffee simply by virtue of the transaction's completion, respondent argues, the buyer of a gun nonetheless "uses" it when *drugs* are his means of payment. But respondent offers absolutely no explanation why this word means one thing in the cafeteria and another in a commercial exchange that takes place on the adjacent street corner.[2] Nor does respondent offer any evidence – because none exists – that Congress intended the term "*use*" to be given the special, unnatural, and expansive meaning respondent urges. *Smith* and *Bailey* are specifically to the contrary. Both looked to general dictionary definitions and examples from outside the U.S. Code to fix the meaning of that very term. See 508 U.S. at 229; 516 U.S. at 145-147; see also *Muscarello* v. *United States*, 524 U.S. 125, 129 (1998) (interpreting the term "carry" in accordance with literary examples, explaining that "there is nothing

---

[1] The supposedly pivotal distinction between cash and other means of exchange was less evident to the government when it presented oral argument in *Smith*. Its argument – that paying for drugs with guns was "use" under § 924(c)(1) – began by stating: "If I purchase drugs with a $100 bill, I have used that $100 bill to buy drugs." Tr. Oral Arg. *Smith*, No. 91-8674, at 24.

[2] Not to trivialize the significance of the question presented, but suppose a defendant offered to supply a slightly larger quantity of drugs if the counterparty would agree to bring a gun *and* a cup of coffee to the exchange. Would one say that the purchaser "used" the gun but not the coffee? Or suppose an individual was considering buying an expensive automobile by trading a large quantity of drugs. If the seller sweetened the deal by offering to supply a gun along with the car, is there any basis to say the buyer did not "use" the car by completing the transaction but somehow "used" the gun?

linguistically special about the fact that weapons, rather than [other items] are being carried").

B. Respondent Distorts *Smith* And *Bailey*

All but conceding that no amount of staring at the statutory language can make "use" mean "receipt," respondent nonetheless asserts that this Court's opinions leave "no doubt" that trading drugs for a gun constitutes "use" of the firearm under § 924(c)(1). Resp. Br. 9-15. This argument depends on a sustained mischaracterization of what *Smith* and *Bailey* held.

1. Respondent's first misstep is to distort the holding of *Smith*. Respondent argues that "[t]he holding in *Smith* was *not* that using a firearm to obtain drugs is 'use' within the meaning of Section 924(c)(1). The holding was a broader one: that using a firearm as an item of trade or commerce in a drug transaction falls within the plain meaning of the text of the statute." Resp. Br. 12 (emphasis added). Make no mistake: Respondent's argument hinges on the assertion that *Smith actually held* that it makes no difference under § 924(c)(1) whether a defendant trades a gun for drugs or trades drugs for a gun.

Smith held no such thing. The question presented was "whether the act of *offering* a firearm, solely as an item of barter, in trade for drugs violates Title 18 United States Code Section 924(c)(1), for use of a firearm during and in relation to a drug trafficking felony," No. 91-8674 Pet. i (emphasis added), and the Court's opinion began: "We decide today whether the *exchange* of a gun *for* narcotics constitutes 'use' of a firearm 'during and in relation to . . . [a] drug trafficking crime' within the meaning of 18 U.S.C. § 924(c)(1)," 508 U.S. at 225 (emphasis added). And throughout the opinion the Court clearly was focused on the conduct of the person who trades the gun in order to receive drugs (*e.g.*, Smith); there is no suggestion that the Court further decided – or rather, offered as *dicta*, since that situation was not presented there – that *receiving* a gun in exchange for drugs is "use" of the gun.

The *Smith* majority rejected the argument that "use" of a firearm within the meaning of § 924(c)(1) should be confined to use *as a weapon*, deciding that the defendant's "use of a firearm

as an item of barter or commerce" qualified. 508 U.S. at 236-237. In so concluding, *Smith* emphasized that the defendant's conduct – "using" an item of value to acquire something else – fell within the ordinary meaning of the term, *i.e.*, to "carry out a purpose * * * by means of," *id.* at 229 (quoting BLACK'S LAW DICTIONARY at 1541 (6th ed. 1990)), and that there was no evidence that Congress intended for such use to be excluded from § 924(c)(1). The Court *did not* hold that an individual whose "purpose" in a transaction is *obtaining* a gun can equally be punished as a gun user, and the thrust of its opinion is completely to the contrary. See 508 U.S. at 235 ("[M]aking a material misstatement *in order to acquire* * * * a gun is not 'use' of the gun *even under the broadest definition of the word 'use.* '") (quoting 18 U.S.C. § 922(a)(6)) (emphasis added).

Similarly, respondent resorts to the passive voice to elide the distinction between *Smith*'s actual holding and the question presented here. Most notably, respondent urges that "[w]hen a firearm *is used* as an item of barter it does not sit on the sidelines, but plays an active role in the trafficking." Resp. Br. 12 (emphasis added). But saying that a gun "is used" in a barter transaction simply begs the essential question: "used" *by whom*? Section 924(c)(1) does not criminalize participation in a drug trafficking transaction where a firearm "is used"; it punishes defendants who actually "use" a firearm – *i.e.*, as a "means" by which to achieve a criminal purpose. *Smith* cannot possibly be read to have held that because a firearm "is used" by one who trades it for drugs, one who receives it likewise "uses" it.

2. Remaking *Smith* is not respondent's only chore. It must also try to blunt the force of the unanimous decision in *Bailey*, which held that § 924(c)(1)'s "use" prohibition authorizes punishment of only those defendants who "active[ly] employ" firearms, 516 U.S. at 150; that those who keep guns "at the ready" to facilitate their drug dealing activities are beyond the provision's reach, *id.* at 149; and that these limitations reflect Congress's intent not to punish as "use" the mere possession of a gun, even for specific criminal purposes, *id.* at 150.

a. Respondent's primary defense against *Bailey* is to replace the "active employment" analysis with an "operative factor" test.

Resp. Br. 14. Respondent's gambit rests exclusively on a single sentence from *Bailey*, which stated "'that § 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.'" Resp. Br. 14 (quoting 516 U.S. at 143). Respondent reads that to mean – the remainder of *Bailey*'s analysis notwithstanding – that a defendant may be convicted of firearm "use" if he participates in a transaction in which the gun makes an offense possible. Not so.

i. For starters, respondent simply misreads the sentence in question, which states that the active-employment test contemplates "*a use* that makes the firearm an operative factor in relation to the predicate offense." 516 U.S. at 143 (emphasis added). That requires (1) a determination that the defendant's conduct was "a use"; and (2) a *further* determination that the use is one that "makes the firearm an operative factor" in the offense. As the Court (and even the petitioners) in *Bailey* acknowledged, it did not strain common understanding to describe the conduct at issue there as "use" – and instrumental use, at that. But while there was nothing unnatural about saying "I *use* a gun to protect my house," 516 U.S. at 143, there is no natural way to say that a purchaser "uses" the item he is buying simply by completing the transaction. Accordingly, it is beside the point whether, under *Bailey*, the firearm received by petitioner was an "operative factor" (whatever that term might mean) in the transaction.

Even assuming that *Bailey* set forth an "operative factor" test, however, it surely did not hold – as respondent contends – that a firearm is an "operative factor" in a drug offense whenever it makes a drug transaction "'possible.'" Resp. Br. 13 (quoting *Smith*, 508 U.S. at 238). Equating "use" with simple "but for" causation not only would render the statutory term almost limitless, it also would fly in the face of *Bailey*'s central thrust. The government argued there that a drug dealer's placing a firearm in close proximity to his drug trafficking activities constituted "use" under § 924(c)(1) because it "facilitate[d]," "emboldened," or "enabled" the offense – *i.e.*, it made his criminal activities possible. U.S. Br. *Bailey*, Nos. 94-7448, -7492, at

10, 14; Tr. Oral Arg. *Bailey*, at 36. The Court emphatically rejected those arguments out of concern that "use" convictions on that basis would "not reasonably be distinguishable from possession," 516 U.S. at 149; see also Pet. Br. 36-37.[3]

ii. Respondent's effort to mine the *Bailey* opinion for some other support for its construction yields remarkably little. Respondent points to a sentence in *Bailey* noting that the Court was not overruling the result in *Smith*: "[T]he active-employment understanding of 'use' certainly includes brandishing, displaying, *bartering*, striking with, and, most obviously, firing or attempting to fire a firearm." Resp. Br. 15 (quoting 516 U.S. at 148 (emphasis added)). Respondent claims that the inclusion of "striking *with*" alongside "bartering" (without a preposition) is proof that the Court did not view "use" as limited to defendants, such as the one in *Smith*, who "barter *with*" guns. This could hardly be more wrong: In ordinary usage, "with" is implicit in the term "barter." And the word "for" is added when describing the object of the exchange: "The Cincinnati Reds traded *for* Tom Seaver in 1977"; the "New York Mets *traded* him." There is no meaningful contrast to be drawn with "striking *with*": without the preposition, the phrase – "striking * * * a gun" – would be nonsense. It would be a mistake, in any event, to "dissect the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 515 (1993). Here the "plain meaning" of *Smith* and *Bailey* refute respondent's misreading.

---

[3] Any suggestion that *Smith* somehow supports an "operative factor" test resting on "but for" causation is also without merit. See Resp. Br. 13 ("Just as in *Smith*, '[w]ithout it, the deal would not [be] possible.'") (quoting *Smith*, 508 U.S. at 238). The quoted language is extracted not from the Court's exposition of the term "use," but rather from its discussion of the statute's separate – and, in the Court's understanding, analytically distinct – "in relation to" requirement. See 508 U.S. at 238.

II. SECTION 924(D) OFFERS NO SUPPORT TO THE CLAIM THAT MERE RECEIPT OF A GUN CONSTITUTES "USE" UNDER § 924(C)(1)

Respondent relies heavily on the argument that the term "use" in § 924(c)(1) must have the same basic meaning as in the adjacent subsection, § 924(d). Resp. Br. 17-20. Although, as we explain below (*infra*, pp. 11-13) the decidedly passive term "intended to be used" in § 924(d) cannot fully illumine the active "use" at issue in § 924(c)(1), we do not dispute that § 924(d) is a helpful guidepost. But respondent's attempt to invoke § 924(d) to prove that "use" means "receipt" is fatally flawed. Respondent's premise – that *any* offense conduct referenced in § 924(d) must be "use" – is refuted by *Bailey*, which squarely held that some of the offense conduct § 924(d) incorporates (*e.g.*, "possession") is not use.

A. Respondent's Argument That All Elements Of § 924(d)'s Predicate Offenses Constitute "Use" Misunderstands *Smith* and Violates *Bailey*

Respondent's argument goes like this: (1) § 924(d) requires forfeiture of firearms "intended to be used" in various predicate offenses; (2) if an offense is listed in § 924(d), ***all*** of the underlying offense conduct must qualify as "use"; (3) some of the offenses listed in § 924(d) include "receipt" among the offense conduct; (4) therefore receipt equals "use." As we show below, the fundamental flaw in respondent's reasoning lies in step (2). While it is arguably true that each of the predicate offenses listed in § 924(d) includes at least *some* offense conduct that could qualify as "use," it is demonstrably *not true* that *all* of the offense conduct for each predicate offense qualifies as "use."

Respondent purports to find support in *Smith* for the assertion that *any* offense conduct included in a § 924(d) predicate offense must be "use." To be sure, *Smith* relied on the meaning of "use" in § 924(d) to illuminate its meaning in § 924(c)(1), but it did not reach so far as respondent suggests. It is helpful first to recall exactly what *Smith* said on the subject:

> Under § 924(d)(1), any "firearm or ammunition intended to be used" in the various offenses listed in § 924(d)(3) is

> subject to seizure and forfeiture. Consistent with petitioner's interpretation, § 924(d)(3) lists offenses in which guns might be used as offensive weapons. See §§ 924(d)(3)(A), (B) (weapons used in a crime of violence or drug trafficking offense). But it also lists offenses in which the firearm is *not* used as a weapon but instead as an item of barter or commerce. * * * In fact, none of the offenses listed in four of the six subsections of § 924(d)(3) involves the bellicose use of a firearm; each offense involves use as an item in commerce. Thus, it is clear from § 924(d)(3) that one who transports, exports, sells, or trades a firearm "uses" it within the meaning of § 924(d)(1) – even though those actions do not involve using the firearm as a weapon.

508 U.S. at 234-235 (footnote omitted).

Thus, *Smith* reasoned that because four of § 924(d)(3)'s predicate offenses did not involve "use" as a weapon *at all* and because two others involved "use" *only* as an item of barter or commerce, "use" in § 924(d) could not be limited to "use" as a weapon. As this Court recognized, however, that conclusion followed only because some of § 924(d)'s predicate offenses included conduct that could be construed *only* as use of a gun as an item of barter or commerce. If they had not, in particular if they had mentioned "use" as a weapon as well, this Court's conclusion would not have followed.

Respondent, however, argues as if the Court in *Smith* ignored this necessary logical step in reasoning, advancing a much broader inferential theory. According to respondent:

> In *Smith*, the Court concluded that, because provisions in Section 924(d)(1) and (d)(3) require the forfeiture of firearms "intended to be used" in various offenses, and those offenses *include* ones where the firearm is used as an item of barter or commerce, "use" in Section 924(c) must also encompass use of a firearm as an item of barter or commerce.

Resp. Br. 17 (emphasis added). In particular, respondent points to the six predicate offenses listed in § 924(d)(3) that criminalize, *among other things*, receiving a gun under certain circumstances – §§ 922(a)(1), 922(a)(3), 922(j), 922(l), 922(n),

& 924(b) – and argues that, since each *includes* receipt among the offense conduct, "use" under § 924(d)(1) necessarily encompasses mere receipt. Resp. Br. 17-20 & n.4.

At the risk of belaboring the point, the distinction between *Smith*'s analysis of § 924(d) and respondent's theory may appear subtle, but is in fact highly consequential. *Smith* (i) looked at the predicate offenses in § 924(d), (ii) observed that some of them involved either *no* use as a weapon or *only* commercial conduct, and (iii) concluded that "use" therefore could not be limited to "use" as a weapon. Respondent, however, (i) looks at the predicate offenses in § 924(d), (ii) observes that some of them *include* receipt (among other things), and (iii) argues that "use" must therefore encompass receipt. That argument – *that any and all offense conduct within § 924(d)'s predicate offenses is "use"* – thus sweeps far beyond this Court's reasoning in *Smith*.

Respondent's logic is also verifiably wrong. That much is evident from § 922(j), which is one of § 924(d)'s predicate offenses. Section 922(j) makes it unlawful "for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm * * * in * * * interstate or foreign commerce * * * knowing or having reasonable cause to believe that the firearm * * * was stolen." 18 U.S.C. § 922(j). While respondent seizes on the single verb "to receive" to argue that because § 924(d) references a "use" in § 922(j) "receipt" must be one, it overlooks the fact that § 922(j) also criminalizes "possession" of a stolen firearm. Although respondent's logic would make *any* offense conduct within § 924(d)'s predicate offenses a "use," *Bailey* left no doubt that "possession" is not "use." 516 U.S. at 143 ("Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided."). Accordingly – and flatly contrary to respondent's crucial premise – not all offense conduct within § 924(d)'s predicate offenses is a "use."[4]

---

[4] It is worth noting that, in addition to "possession," § 922(j) criminalizes the "conceal[ment]" or "stor[age]" of a weapon, neither of which could satisfy *Bailey*'s active-employment definition of use.

Thus, the very most that respondent could hope to glean by comparing § 924(c)(1) to § 924(d)'s predicate offenses is that the latter *include* some conduct that could be construed as "use." And it is clear that § 924(d)'s predicate offenses include a variety of conduct that could be "use," along with a variety of conduct (including receipt) that could not. Section 922(a)(1), for example, makes it unlawful "for any person except [certain licensees] to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce." Since that provision clearly establishes some "uses" apart from receipt, respondent cannot argue that one of the remaining activities, receiving a gun, necessarily constitutes a "use." If there must be a "use" somewhere in this provision, it can logically (and linguistically *must*) lurk elsewhere.[5]

Finally, the flaw in respondent's reasoning is confirmed by *Smith* itself. The Court there recognized that Congress employed the term "intended to be used" with respect to some predicate offenses but authorized forfeiture when the firearm is merely "involved in" other predicate offenses. 508 U.S. at 235. *Smith* noted that an "examination of the offenses to which the 'involved in' language applies reveals why Congress believed it necessary to include such an expansive term," because at least some of the "involved in" offense conduct could not possibly be deemed "use" of a firearm. 508 U.S. at 235.[6] More importantly for present purposes, *Smith* focused on one of those predicate offenses, § 922(a)(6), to illustrate the point: "[M]aking a material misstatement *in order to acquire* or sell a gun," *Smith* observed, "is not 'use' of the gun *even under the broadest definition of the word 'use.'*" 508 U.S. at 235 (emphasis added). That is, where a defendant engages in criminal conduct that is

---

[5] Four of the remaining provisions to which respondent points – §§ 922(a)(3), 922(l), 922(n), and 924(b) – have an almost identical structure.

[6] As we have explained (Pet. Br. 23-24) the inclusion of receipt-based offenses in § 924(d)'s "involved-in" forfeiture provision evidences Congress's intent *not* to equate "use" with "receipt."

necessary (indeed, specifically designed) "to acquire" a gun, the gun is "involved in" the offense but not "used" by the defendant. Just as "a gun with respect to which a material misstatement is made * * * is not 'used' in the offense," *ibid.*, a gun with respect to which drugs are traded in order to obtain it is not "used." In sum, *Smith* not only provides no refuge for respondent's § 924(d) arguments, it belies the notion that simply doing an act in order to obtain an object "uses" the object.

B. Section 924(d)'s Specialized Purpose And Passive Grammatical Construction Deny It A Dispositive Role In Interpreting § 924(c)(1) In This Case

Respondent's argument that § 924(d) compels its reading of § 924(c)(1) in this case fails for another reason. Even if each of the provisions respondent points to criminalized *only* receipt (and they do not), deep differences between § 924(c)(1) and § 924(d) limit the insight the latter provides here.[7] First, as this Court has recognized, "§ 924(d) is not an additional penalty for the commission of a criminal act," as § 924(c)(1) is, "but rather is a separate civil sanction remedial in nature." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984). Second, as a civil forfeiture provision, § 924(d) aims at the property, not the person. See *United States* v. *Bajakajian*, 524 U.S. 321, 330 (1998). It provides an *in rem* action against a thing, *89 Firearms*, 465 U.S. at 366, whereas § 924(c)(1), a primarily sentence-enhancing provision, proceeds *in personam* against a criminal defendant. As this Court explained in

---

[7] It is important to note that these differences were not relevant in either *Smith* or *Bailey*. In *Smith*, the Court looked to § 924(d) only to determine if "use" under § 924(c)(1) was limited to use "as a weapon." 508 U.S. at 234-235. Its § 924(d) inquiry ran only to the character of the "use." Since that "use," giving a gun in return for drugs, was indisputably active, the significance of § 924(d)'s more encompassing passive construction was not at issue. Similarly, in *Bailey*, the Court looked to § 924(d) only to show that had Congress wanted to broaden application of § 924(c)(1) beyond "actual use" it knew how to do so. 516 U.S. at 146. Congress's employment of broader language – "intended to be used" – in § 924(d)(1) was evidence, the Court believed, that § 924(c)(1)'s simple "use" had more precise and limited meaning.

Bajakajian, "[h]istorically, the conduct of the property owner [in civil forfeiture actions] was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime." 524 U.S. at 330. So long as forfeiture proceedings are civil, not criminal, affected property can be confiscated from anyone – even if the owner has no relation to any underlying crime. *Origet* v. *United States*, 125 U.S. 240, 246 (1888).

The grammatical construction of § 924(d) reflects this difference. This subsection provides that "[a]ny firearm * * * involved in or used [in various offenses or] intended to be used [in certain other offenses] is subject to seizure and forfeiture * * *." Unlike provision establishing criminal liability or the length of criminal sentences, it employs the passive grammatical voice and subjects to forfeiture any firearm "intended to be used" by anyone, not just by someone subject to criminal liability, in one of the referenced substantive offenses. Thus, consistent with the long-recognized purposes of civil *in rem* forfeiture actions, it reaches an item intended to be employed in particular activities – no matter who employs it.

Section 924(c)(1), by contrast, focuses on the actions of particular individuals. It speaks in the active grammatical voice and imposes a lengthy sentence on a criminal defendant who, "during and in relation to any * * * drug trafficking crime * * * uses * * * a firearm * * *." 18 U.S.C. § 924(c)(1) (emphasis added). The active voice connects the use of a firearm to the defendant. In order for a court to impose the sentence, he, not someone else, must "use" the gun.

In this important sense, § 924(d) sweeps more broadly than § 924(c)(1). It provides for forfeiture of guns "intended to be used" in certain enumerated transactions no matter who intends to use them. Section 924(c)(1), on the other hand, operates only when a particular individual "uses" a gun. It respects the fundamental principle of the criminal law that, except in special circumstances, one cannot be sanctioned purely for someone else's behavior. Although "use" of a gun by someone somewhere in one of § 924(d)'s specified transactions can be grounds for civil *in rem* forfeiture, "[use] in the air, so to speak, will not do," *Palsgraf* v. *Long Island R.R. Co.*, 162 N.E. 99, 99

(N.Y. 1928), to subject a person to criminal punishment under § 924(c)(1). Respondent ignores this large and important difference between § 924(d) and § 924(c)(1).

III. NO POLICY CONSIDERATION SUPPORTS GIVING "USE" AN UNNATURAL CONSTRUCTION

Respondent repeatedly argues that giving "use" a broad and unnatural meaning is warranted by policy considerations – namely Congress's commitment to combating the "'dangerous combination' of 'drugs and guns.'" Resp. Br. 22 (quoting *Muscarello*, 524 U.S. at 132, and *Smith*, 508 U.S. at 240). But this Court's decisions long ago settled that even the most compelling policy considerations provide no legitimate ground for judicial "enlarge[ment]" of a federal criminal statute, see *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820) (Marshall, C.J.), and the very policy argument advanced here was presented – and rejected – in *Bailey*, see U.S. Br. *Bailey*, Nos. 94-7448, -7492, at 38 (quoting *Smith*). Indeed, the argument for bending statutory text to advance this purpose is in every way weaker in this case than it was in *Bailey*.

For example, while respondent implies that *Bailey* dealt only with "locked-away weapons" (Br. 14), the decision expressly held that the "use" prong did not authorize punishment of a drug dealer who kept a gun "at the ready for an imminent confrontation," 516 U.S. at 149.[8] Moreover, the government in *Bailey* could point to at least some evidence that Congress actually intended for the activity at issue – possession of a weapon to protect a "fortress" or embolden a drug dealer – to be punished as "use." See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 6212, 102 Stat. 4360 (1998) (amendment to reach

---

[8] Indeed, the convictions invalidated by *Bailey* included those of large-scale drug dealers who kept loaded, automatic weapons at hand, with every intention of using them (as weapons) if necessary, to accomplish criminal purposes. *E.g.*, *United States* v. *Matra*, 841 F.2d 837, 839 (8th Cir. 1988) (defendant arrested in house with seven guns, including loaded assault rifle and loaded submachine gun, hundreds of rounds of ammunition, and 565 grams of cocaine), abrogation recognized by *United States* v. *McKinney*, 120 F.3d 132, 133 (8th Cir 1997).

gun use during and in relation to possession with intent to distribute offenses). Thus, in *Bailey*, the government could argue plausibly that employment for security purposes was the most common way that such offenders "used" such weapons. See Pet. Br. at 35-36. By contrast, there is no evidence that Congress had "drug-wielding" gun buyers in mind when enacting (or amending) § 924(c)(1).

Meanwhile, "the obvious congressional intent to require more than possession" that *Bailey* found sufficient to rebut the government's policy arguments, 516 U.S. at 144, applies more directly and forcefully in this case. The appellate decisions *Bailey* overturned already recognized that "mere possession" was not enough, see *id.* at 143 (D.C. Circuit rule required "proximity and accessibility"), but the Court concluded that, in practice, these rules would not sufficiently respect that legislative judgment. Here, far from accepting a "possession plus" limitation, as did the D.C. Circuit's *Bailey* rule, respondent's construction would extend "use" to "possession minus." See *United States* v. *Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) (vacating conviction under "use" prong of defendant arrested before ever taking possession of guns).

Unsurprisingly, respondent's policy argument spends less time on *Bailey* than on *Smith*, which it gamely describes as "reaffirmed" by *Bailey* (Br. 6, 11, 27) and characterizes as holding that "the presence of [a] firearm at the drug transaction" is a basis for punishment under the "use" prong (*id.* 24). If "introduction [of guns] into the scene of drug transactions" (Br. 22 (quoting 508 U.S. at 239 and *Harris* v. *United States*, 959 F.2d 246, 262 (D.C. Cir. 1992))), is "use," the Government insists, "it would make no sense for Congress to penalize one who brings a gun to trade for drugs but ignore[] the drug dealer who takes a gun from that person" (Br. 23-24).

That argument is wrong many times over. First, unlike § 924(d)'s forfeiture provision, § 924(c)(1) is not an *in rem* remedy against firearms that are "present" or "introduced" in a criminal transaction. Moreover, *Bailey* made clear that presence is not (nearly) enough to convict even the person who "introduce[s] a weapon into the scene"; punishment is

authorized only for the person who brings "his gun" to commit a crime (rather than "leaving [it] at home," 114 Cong. Rec. 22,231 (1968) (Rep. Poff)) *and* "actively" employs it. Thus, while *Bailey*'s construction of the provision was "not inconsistent" with the result in *Smith*, *Bailey* rejected, rather than "reaffirmed," any suggestion in *Smith* that presence or "facilit[ation]," 508 U.S. at 238 (or even "potential * * * facilitat[ion]," *id.*) would be "use." See *Stewart*, 246 F.3d at 731 ("[T]he interpretation of 'use' we employed in *Harris* does not survive after *Bailey*"); *Jones* v. *United States*, 529 U.S. 848, 856 (2000) (*Bailey* "reject[ed] the Government's argument that a gun is 'used' whenever its presence 'protects drugs' or 'emboldens' a drug dealer").

The phenomenon respondent purports to find baffling – treating parties on different sides of a criminal transaction differently – is ubiquitous in the criminal law. See Pet. Br. 26-27 (citing different statutory treatment of those who distribute and purchase drugs). And there is no contention here that Congress "ignored the conduct" of Mr. Watson and others who "take[] guns." Mr. Watson's conduct resulted in convictions for violating two federal statutes, 18 U.S.C. § 922(g) and 21 U.S.C. § 841(a)(1), producing a stiff sentence. Cf. *Wiltberger*, 18 U.S at 105 (even where it can "conceive no reason why [defendant's acts] * * * should not be punished * * * this Court cannot enlarge [a criminal] statute").

So clarified, there is nothing remotely counterintuitive, let alone "sense[less]" (Resp. Br. 23), about giving effect to the provision as Congress enacted it. The distinction drawn is entirely consistent with what this Court – at the Government's repeated urging – has described as the policy animating § 924(c)(1): to "persuade the man who is tempted to commit a Federal felony to leave his gun at home." *Muscarello*, 524 U.S. at 132 (quoting Poff statement). U.S. Br. *Bailey* at 28; U.S. Br. *Smith*, No. 91-8674, at 9; see also Tr. Oral Arg. at 38, *Smith*, *supra* ("[W]e think that the statute should be construed in accordance with that literal language, as the original sponsor of the statute indicated, Congressman Poff.").

Even if judicial enforcement of Congress's policy judgments depended on proof that they are "sensible," the justification for this difference is blazingly obvious: those who exercise dominion and control over guns have the power to intimidate, deter, or physically harm those with whom they interact in ways that gun-seeking, "drug-wielding" individuals such as Mr. Watson do not. That is why even decisions rejected by *Bailey* for imposing liability too expansively had held possession of the gun to be an indispensably necessary prerequisite for punishment. *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.), recognized as overruled by *Bailey* in *United States* v. *Hernandez*, 80 F.3d 1253 (9th Cir. 1996); *United States* v. *Long*, 905 F.2d 1572, 1577 (D.C. Cir. 1990) (Thomas, J.).

"Experience [may] demonstrate[]," that a gun "can be converted instantaneously from currency to cannon," (Resp. Br. 22 (quoting *Smith*, 508 U.S. at 240)), but only by the person who possesses it. And any "not implausible scenario[]" in which a gun could be employed by a recipient "to injure or kill somebody'" (Resp. Br. 24 (quoting *United States* v. *Phelps*, 895 F.2d 1281, 1286, 1288 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc))), would surely involve further, *active* use after receipt – *which would be punishable under § 924(c), without the rule the Government seeks here.* See, e.g. Resp. Br. 24 (hypothesizing case of "recipient of an unloaded firearm" who then "'display[s it] * * * [to] instill fear in others'") (citing *McLaughlin* v. *United States*, 476 U.S. 16, 17 (1986)).

Indeed, even the symmetry that respondent claims for its rule turns out to be illusory. In cases like *Smith*, defendants may be prosecuted whether or not the drugs actually change hands – because *attempted* possession is itself a drug trafficking offense. See *United States* v. *Burgos*, 254 F.3d 8, 11-12 (1st Cir. 2001). But the Government's theory here (though not in previous cases) appears to be that it was Mr. Watson's "accepting" or "taking" (Br. 7, 9) the gun that made it use. The reason for this evident shift is not difficult to fathom – it is especially hard to claim that a test requiring "active use" and (substantially) more than "mere possession" is met in a case, such as *Montano*, where the

defendant never even gained possession of the gun. But this more credible stance comes at a price: It compromises respondent's ability to deny the obvious "difference" between the gun-wielding attempted drug-possessor and the "drug-wielding" individual on the other side of the transaction.

Respondent's attempt (Br. 23) to transplant the "line drawing" discussion from *Smith* likewise misses the point. The "fine * * * distinction[s]" that concerned the *Smith* majority arose from the fact that the person who brings his firearm with him to the scene of a drug purchase may, at different moments, be brandishing, displaying, or referring to the weapons – indeed he may be doing these at the same time. Whatever difficulty juries might have applying a test (like the one advocated in the *Smith* dissent) that treated only some of this conduct as "use" are absent here: A rule that tracks the ordinary distinction between use and receipt is a matter of common sense. Guns do not lose their "'destructive capacity'" (Resp. Br. 22 (quoting 508 U.S. at 240)) when used as currency, but that capacity is not available to a recipient until after he takes possession – and it is not punishable until the capacity is actively put to use.

Nor is there merit to the startling suggestion (Resp. Br. 13-14 n.2) that society's interest in discouraging *drug trafficking* is reason for judicially re-writing § 924(c)'s "use" provision. Respondent (quoting *United States* v. *Frederick,* 406 F.3d 754, 764 (6th Cir. 2005)) notes that if those in Mr. Watson's position "did not accept possession of the gun, and instead insisted on being paid fully in cash for * * * drugs, some drug sales – and therefore some drug trafficking crimes – would not take place." *This* drug trafficking crime, of course, would not have taken place had the agent not urged Watson to use drugs, rather than cash, as the payment medium (and the market effects of assuring drug sellers that buyers will arrive unarmed are not self-evident). There is, to say the least, not the slightest indication that Congress enacted § 924 to chip away at the volume of drug sales, by discouraging sellers from servicing the segment of the drug-buying public that (even after *Smith*) prefers to pay with weapons, rather than cash.

Respondent – likely aware of its highly ambiguous significance – confines to a footnote (Br. 25 n.6) an explicit version of the argument on which much of its submission implicitly depends: that because he is supposedly jointly responsible for the danger, it would be permissible to punish an individual in Mr. Watson's position on a secondary liability theory as "an aider and abettor." See also Br. in Opp. 8-9 (arguing that individuals can be prosecuted under "possession in furtherance" language of § 924). Respondent acknowledges that it did not proceed against Mr. Watson on either theory – and that it could not have charged him as an aider and abettor, because, *inter alia*, the "offense" he encouraged was no § 924 violation at all (but rather a law enforcement operation, conducted under controlled conditions by government agents, intent on adding the enhancement to the sentence he faced for being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1)).[9] The Court should not uncritically accept respondent's assertions about these other theories, which are not before the Court. But if the Government were right, that would be yet another reason for *not* contorting the statute's "use" prong here.

---

[9] Respondent's attempt to turn the undeniable scent of government-manufactured crime to its advantage (Br. 24, citing *United States* v. *Jimenez Recio*, 537 U.S. 270, 276 (2003)) cannot succeed. That concerns about "entrapment like" behavior are not reason to modify an otherwise appropriate and correct legal rule surely does not support giving a statute a construction incompatible with its plain meaning to *encourage* tactics that push the entrapment line. And *Jimenez* did not overturn longstanding precedent recognizing that statutes should be construed in ways that minimize "arbitrary enforcement." *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). That concern is obviously implicated here – not merely because so many of these cases involve "gun barterers" who are government agents (hardly surprising, given what the *Smith* rule provides), but because the legal rule respondent advances, where decades-long sentences depend on law enforcement officers' decisions whether or not to hand over a gun before arrest, truly does enshrine a "distinction" without a legitimate public safety "difference."

IV. RESPONDENT'S ACCOUNT OF THE LENITY DOCTRINE IS INCOMPLETE AND MISLEADING

In our opening brief (at 9-38), we explained that the statutory interpretation issue here may – and should – be resolved in petitioner's favor without recourse to the rule of lenity and related canons of construction. Although it would be asking a lot to expect the Government to welcome (in a case where it had not already confessed error) that doctrine's application,[10] respondent's boilerplate presentation – a pastiche of especially restrictive language – is sufficiently misleading and incomplete to warrant a brief response.

First, decisions rendered after the ones cited in respondent's brief take a less stinting view of lenity's domain. See *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 408-409 (2003) (a "criminal statute * * * must be strictly construed, and any ambiguity must be resolved in favor of lenity" * * * * [W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language") (quoting *McNally* v. *United States*, 483 U.S. 350 (1987)); *Cleveland* v. *United States*, 531 U.S. 12 (2000) (same). Respondent's assertion that the rule "comes into play *only* when there is a 'grievous ambiguity'" (Br. 29 (emphasis added)) cannot account for decisions cited (Pet. Br. 40 & n.10) that rely on lenity as an additional, alternative ground for rejecting an interpretation advanced by the government.

The self-serving boilerplate also ignores opinions, such as the unanimous decision in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), that apply rules of narrow construction, but would not turn up in a database search for "lenity." See

---

[10] Compare, e.g., U.S. Br. *Leocal* v. *Ashcroft*, No. 03-583, at 37 n.17 (arguing lenity doesn't apply); U.S. Br. *Arthur Andersen LLP* v. *United States*, No. 04-369, at 38 (same); and U.S. Br. *Castillo* v. *United States*, No. 99-658, at 44 n.26 with *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (holding lenity rule would "constrain" court "to interpret any ambiguity in the statute in [the defendant's] favor"); *Castillo* v. *United States*, 530 U.S. 120, 131 (2000) (same); and *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (applying traditional rule of "restraint in assessing the reach of a federal criminal statute") (internal quotation marks omitted).

id. at 703 (relying on "traditional [rule of restraint]" in construing criminal laws, described as grounded in "deference to the prerogatives of Congress * * * and * * * concern [for] 'fair warning'"); *Cleveland*, 531 U.S. at 25 (government must point to "clear and definite" statutory language to obtain "the harsher [of two] alternative [constructions]").

More important, these and other cases make clear that while the "rule of lenity" *per se* may not be expansive, the principles on which it is grounded – fair notice, congressional law-making, maintaining the state-federal balance, and avoiding arbitrary enforcement – find expression in a number of other overlapping and mutually reinforcing canons and doctrines. See, *e.g.*, *Bousley* v. *United States*, 523 U.S. 614, 620 (1998); *City of Chicago* v. *Morales*, 527 U.S. 41, 56-60 (1999) (due process vagueness); *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (federalism clear statement rule).

There is no urgent need here for a definitive restatement of the rule of lenity, because *every* tool of construction – most notably, the rule that a statute should be given its plain meaning – stands strongly against the expansive, legislatively unauthorized, arbitrary, and unforeseeable construction of § 924(c)(1) respondent asks the Court to endorse.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434)924-3127

KARL J. KOCH
McGlynn, Glisson & Koch
340 Florida Street
Baton Rouge, LA 70801
(225) 344-3555

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
2000 L Street, N.W.
Washington, D.C. 20036
(202) 466-2234

**Counsel of Record*

AUGUST 2007